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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL EDWARD BESS, Defendant and Appellant.	G056254 (Super. Ct. No. 96CF3190) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorneys General, Eric A. Swenson and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In 1997, Daniel Edward Bess was convicted of second degree burglary and sentenced to a third strike sentence of 25 years to life. Subsequently, the electorate enacted Propositions 36 and 47, which provide resentencing relief for certain third strike defendants and certain theft-related crimes respectively. Bess sought relief under both Propositions. The trial court denied Bess's petition, concluding it could not reduce his burglary conviction to misdemeanor petty theft under Proposition 47, and that he was ineligible for resentencing relief under Proposition 36 because he posed a risk to public safety. Bess challenges both determinations on appeal. For the reasons stated below, we reject his challenges and affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A police officer on patrol spotted Bess and another person engaged in suspicious activity near a pickup truck. The two entered a nearby Celica and, when the officer turned on his emergency lights, they sped away at a high rate of speed. A police inspection of the pickup truck found it had been forced open and was missing two speakers, which were found later in the Celica. (*People v. Bess* (Mar. 30, 1999, G021682) [nonpub. opn.].) Bess was convicted of second degree burglary (Pen. Code, § 459)[1], and sentenced to a third strike sentence of 25 years to life. (*People v. Bess* (Jan. 12, 2016, G049721) [nonpub. opn.].)

In November 2012, the electorate passed Proposition 36, which revised the Three Strikes law to reduce the punishment prescribed for certain third strike defendants. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); *People v. Conley* (2016) 63 Cal.4th 646, 651.) Proposition 36 also authorized defendants presently serving third strike sentences to seek resentencing under the amended penalty scheme by filing a petition to recall the sentence. (§ 1170.126, subd. (b).) Subsequently, Bess filed a petition to recall

[1] All further statutory references are to the Penal Code unless otherwise designated.

his sentence on the burglary conviction under Proposition 36. (*People v. Bess* (Jan. 12, 2016, G049721) [nonpub. opn.].)

The trial court denied Bess's petition. Initially, this court affirmed because in the same prosecution for second degree burglary, Bess had been convicted and sentenced to a third strike term on an armed robbery charge, which rendered him ineligible for Proposition 36 relief. The Supreme Court later held that Proposition 36 requires trial courts to evaluate an inmate's eligibility on a count-by-count basis. (See *People v. Johnson* (2015) 61 Cal.4th 674, 688, and therefore transferred the matter back to us for reconsideration. We reversed the order denying the Proposition 36 petition, and remanded the matter to "the superior court to further evaluate defendant's eligibility and entitlement to be resentenced for his conviction of second degree burglary." (*People v. Bess* (Jan. 12, 2016, G049721) [nonpub. opn.].)

In the interim, the electorate enacted Proposition 47, "the Safe Neighborhoods and Schools Act," which amended existing statutes to reduce penalties for certain theft and drug offenses, and added several new provisions, including section 490.2, which redefined certain thefts of property worth less than $950 as misdemeanor petty thefts. (*People v. Romanowski* (2017) 2 Cal.5th 903, 907-909.) On remand, Bess expanded his request for resentencing relief to include the ameliorative provisions of Proposition 47. He argued the court should reduce his second degree burglary conviction to misdemeanor petty theft under section 490.2 because he stole speakers worth less than $950.

The trial court denied resentencing relief on the second degree burglary conviction, concluding the burglary conviction was not reducible to misdemeanor petty theft under Proposition 47. It denied resentencing relief under Proposition 36 because it found Bess posed a risk to public safety.

II

DISCUSSION

A. *Proposition 47*

Section 490.2, subdivision (a), provides in relevant part that "[n]otwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor." Bess contends his second degree burglary should be reduced to misdemeanor petty theft because his theft of the speakers from the truck fell within the scope of section 490.2, notwithstanding the fact the theft occurred by means of a burglary. We disagree.

By its express terms, Section 490.2 applies only to theft offenses. A burglary, however, is not a theft offense because theft is not an element of the offense. (*People v. Acosta* (2015) 242 Cal.App.4th 521, 526 (*Acosta*); see also *People v. Allen* (1999) 21 Cal.4th 846, 866 [defendant may be convicted of burglary and receiving stolen property notwithstanding rule prohibiting simultaneous theft and receiving property convictions because a person "'convicted of burglary is not convicted of stealing any property at all'"].) Thus, the burglary of a truck does not fall within the scope of section 490.2 (See *Acosta, supra,* 242 Cal.App.4th at p. 526 [attempted car burglary not reducible to misdemeanor petty theft under section 490.2 because it is not "another form of theft"].)

Bess's reliance on *People v. Page* (207) 3 Cal.5th 1175 (*Page*) and *People v. Williams* (2018) 23 Cal.App.5th 641, is misplaced. In *Page,* the California Supreme Court determined that "Proposition 47 makes some, though not all, [Vehicle Code] section 10851 defendants eligible for resentencing." (*Page, supra,* 3 Cal.5th at p. 1184.) The high court noted there are "theft and nontheft forms of the Vehicle Code section 10851 offense." (*Id*. at p. 1183; see also *People v. Garza* (2005) 35 Cal.4th 866, 871 ["a

defendant convicted under section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction and may not also be convicted under section 496(a) of receiving the same vehicle as stolen property"]). The court held a Vehicle Code section 10851 conviction may be reduced to a misdemeanor "if the vehicle was worth $950 or less and the sentence was imposed for theft of the vehicle." (*Id.* at p. 1187.) In *People v. Williams*, the appellate court held that a conviction for buying or receiving a stolen vehicle (§ 496d) is a theft offense, and thus may be reducible to misdemeanor theft under section 490.2. (*People v. Williams*, 23 Cal.App.5th at pp. 649-650.) In contrast, burglary is not a theft offense. Thus, neither *Page* nor *People v. Williams* casts doubt on the holding in *Acosta* that car burglary is not reducible to misdemeanor petty theft under section 490.2. The trial court did not err in denying Bess resentencing relief pursuant to Proposition 47.

B. *Proposition 36*

Proposition 36 "enacted a procedure governing inmates sentenced under the former Three Strikes law whose third strike was neither serious nor violent, permitting them to petition for resentencing in accordance with Proposition 36's new sentencing provisions. [Citation.] The resentencing provisions provide, however, that an inmate will be denied resentencing if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.] Proposition 36 did not define the phrase 'unreasonable risk of danger to public safety.'" (*People v. Valencia* (2017) 3 Cal.5th 347, 350.) "In exercising its discretion to deny resentencing, the court has broad discretion to consider: (1) the inmate's 'criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes'; (2) his or her 'disciplinary record and record of rehabilitation while incarcerated'; and (3) '[a]ny other evidence the court, within its discretion, determines to be relevant in

deciding whether a new sentence would result in an unreasonable risk of danger to public safety.' [Citation.]" (*Id.* at p. 354.)

We review a denial of resentencing based on dangerousness under a mixed standard. We review the facts and evidence on which the court based its finding of unreasonable risk for substantial evidence. (*People v. Frierson* (2017) 4 Cal.5th 225, 239.) We review the trial court's finding that the defendant presents an unreasonable risk of danger to public safety under the abuse of discretion standard. (*People v. Losa* (2014) 232 Cal.App.4th 789, 791.) "'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]"' [Citation.]" (*People v. Jefferson* (2016) 1 Cal.App.5th 235, 242-243.)

Here, in denying the Proposition 36 petition, the trial court explained, "The ongoing criminality that the defendant has shown in prison is both numerous and troubling to the court." The court noted that Bess's criminal history involved "all manners of criminal activity from both violence and drug abuse," as well as his record while in prison, which included "deceit upon the prison authorities" by "importing drugs" under "the guise of legal mail." The court also noted that Bess was on parole at the time of his offense. The court noted Bess's recent conduct showed "a step forward," but concluded his recent history did "not overcome remotely the ongoing criminality that the court has seen throughout the exhibits that were submitted to the court." It concluded that Bess "does currently and continues to pose a risk . . . to public safety."

Bess contends the trial court abused its discretion in denying his Proposition 36 petition because it applied the wrong legal standard in determining whether he poses an unreasonable risk of danger to public safety. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85 ["A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand."].) Bess contends the

court should have considered his dangerousness when he would be eligible for parole, at the age of 61 in 2027. (See *People v. Williams* (2018) 19 Cal.App.5th 1057, 1064 (*Williams*) ["trial court's failure to consider when, if ever, defendant would be released if the petition was granted was an abuse of discretion"].)

As an initial matter, we note that below Bess raised two arguments based on *Williams*: (1) the dangerousness determination should be deferred to prison authorities, and (2) the court should consider his dangerousness at the point in time when he would be released. Bess argued *Williams* compelled the court to consider Bess's dangerousness "when he would released and that's ultimately a CDC determination." The prosecutor disagreed with *Williams*'s suggestion that the court "put off a determination" of dangerousness until a future date. Citing *People v. Buford* (2016) 4 Cal.App.5th 886, the prosecutor argued the court should consider Bess's dangerousness "with the idea that [he] could be released immediately."

In *Williams*, the appellate court stated: "If defendant's claim is correct, then granting the [Proposition 36] petition would not entitle defendant to be released. Rather, the dangerousness determination would be deferred until defendant was 77 and would be vested in the Board of Parole Hearings." (*Williams, supra,* 19 Cal.App.5th at p. 1063.) Nothing in Proposition 36, however, authorizes a trial court to bypass the dangerousness determination and delegate it to the Board of Parole Hearings. Rather, section 1170.126, subd. (f), expressly vests the trial court with discretion to deny resentencing relief if the court "determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Thus, we reject *Williams* to the extent it holds the dangerousness determination may be deferred or bypassed.

Bess contends the trial court abused its discretion when it failed to consider his release date in determining dangerousness. The trial court, however, never expressly declined to consider Bess's future release date. It stated that it considered all the factors enumerated in section 1170.126, and its conclusion that Bess "does currently and

continues" to pose an unreasonable risk of danger to public safety suggests it did take Bess's future release date into account. (Italics added.) In the absence of any indication to the contrary, we must presume that the trial court understood and properly applied the resentencing provisions in this case. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 ["'in the absence of any contrary evidence, we are entitled to presume that the trial court . . . properly followed established law'"]; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517 ["general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues"].) Accordingly, we find no abuse of discretion in the court's denial of Bess's resentencing petition.

III

DISPOSITION

The order denying Bess's resentencing petition is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.